

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

SKYLER P.,

Claimant,

vs.

NORTH BAY REGIONAL CENTER,

Service Agency.

OAH No. N 2006070849

DECISION

This matter was heard before Michael C. Cohn, Administrative Law Judge, State of California, Office of Administrative Hearings, in Napa, California, on October 3, 2006.

Claimant was represented by his father, Robert P.

The service agency was represented by Nancy Ryan, Attorney at Law.

The matter was deemed submitted for decision on October 3, 2006. On October 13, 2006, the administrative law judge reopened the record and asked the parties to provide copies of the Notice of Proposed Action and request for hearing that led to the August 5, 2005 mediation in OAH Case No. N2005070370. The parties were granted until October 20, 2006 to object to receipt of the documents. The requested documents were received from claimant on October 17, 2006. They were marked collectively as Exhibit 17. No objections to the documents were raised and they were received in evidence. The matter was deemed resubmitted for decision on October 20, 2006.

ISSUE

The issues are: 1) Whether claimant's receipt of Aid to Adoptive Parents benefits obviates the service agency's obligation to fund needed nursing respite services, and 2) if not, whether a mediation agreement entered into by the parties frees the service agency of its obligation to fund the services.

FACTUAL FINDINGS

1. Claimant is a five-and-one-half year-old service agency client. He has been diagnosed with cerebral palsy, spastic quadriparesis, cortical blindness, generalized seizures, and profound mental retardation. Claimant is totally dependent on others for all his care needs. Claimant resides with his adoptive parents – his maternal great-grandmother, Nancy P., and her husband, Robert P.¹ Claimant's adoption was finalized in mid-2005 and the family began receiving a subsidy from the Aid to Adoptive Parents (AAP) program.

2. On July 12, 2006, the service agency issued a Notice of Proposed Action denying continued funding for parent-vouchered nursing respite. Claimant appealed and this proceeding ensued. The service agency agrees that claimant requires nursing respite services but maintains it is not required to fund those services for two reasons. First, the service agency contends that the AAP subsidy claimant's parents receive constitutes a "generic resource" that is designed to cover claimant's care needs, including respite. Second, the service agency maintains that claimant entered into a mediation agreement that called for termination of parent-vouchered nursing respite effective April 30, 2006. Therefore, claimant is bound by that agreement and is not entitled to seek a continuation of nursing respite absent a showing of changed circumstances.

Claimant contends that his family's receipt of an AAP subsidy does not obviate the service agency's obligation to provide the needed nursing respite. And claimant denies that he agreed in mediation to termination of nursing respite services.

History of Nursing Day Care and Respite

3. Based upon his care needs, the service agency determined that claimant was eligible for service-agency-funded nursing day care services. However, unable to find a nurse to provide these services, the service agency vendorized claimant's mother, Nancy P., to provide care and supervision to him. On a date not established in the record, the service agency began paying claimant's mother a \$2,609 per month cash grant in lieu of nursing day care.

4. In claimant's May 25, 2004 Individual Program Plan (IPP) it was noted: "Nancy needs a cash grant in lieu of daycare due to [claimant's] intense care needs. They also meet the criteria for In-Home Nursing respite." The IPP then stated, "NBRC will continue to authorize the cash grant, with Nancy P[,] as the caregiver, effective through 9-30-

¹ Although it is recognized that at the time of some of the matters discussed claimant's adoption had not yet been finalized, for the balance of this decision Nancy P. and Robert P. will be referred to, respectively, as "claimant's mother" and "claimant's father," and collectively as "claimant's parents."

04,” and “NBRC will authorize in-home nursing respite, through Advantage Home Healthcare, for up to 105 hours per quarter, effective 7-01-04 through 6-28-04 [sic].”²

5. Eleven months later, recognizing that claimant’s adoption was in process and that the family would soon begin receiving an AAP subsidy, an IPP addendum was prepared on April 15, 2005. The addendum stated, “NBRC will continue to fund cash grant in the amount of \$2,609 per month, with Nancy P[.] as caregiver, in lieu of daycare, effective through 4.01.05 to 10.15.05, or until family is given AAP monies, consistent with Family Cost Participation Plan.” The addendum further stated, “NBRC will continue to fund in-home nursing respite, through Advantage Home Healthcare, for up to 105 hours per quarter, through 6.30.05 consistent with Family Cost Participation Plan,” and “NBRC will continue to fund in-home nursing respite, through Advantage Home Healthcare, for up to 105 hours per quarter, effective 7.01.05 to 10.15.05, or until family is given AAP monies, consistent with Family Cost Participation Plan.” Finally, the addendum stated: “NBRC funded service to be authorized only until AAP monies are awarded to family as they are for Skyler’s care and supervision needs, and NBRC would be funding a duplication of services.”

6. The AAP is a program administered by the Department of Social Services to encourage adoption of children who would otherwise be likely to remain in long-term foster care. If the child is a regional center client, the regional center determines the level of care the child would require if placed in a residential care facility, and the maximum AAP benefit is then set with reference to the residential care facility rate established by the Department of Developmental Services for that level of care.

7. Claimant’s adoption was finalized around May or June 2005. In compliance with a fair hearing decision issued in March 2005 (In the Matter of Skyler S-B v. North Bay Regional Center, OAH Case No. N2004110541), the service agency provided a “rate letter” to the Department of Social Services stating that the appropriate level of care for claimant was Service Level 4I. As a result of that rate letter, claimant’s family began receiving an AAP subsidy of \$5,009 per month.

8. On July 11, 2005, a new IPP addendum was prepared. It states, in part, “Nancy receives a cash grant in lieu of daycare, because it was deemed by NBRC to be [a] cost effective solution to the daycare needs of the family. Also, they are authorized to receive nursing respite care through Advantage Home Healthcare Inc. However, Mr. and Mrs. P[.] are currently looking to receive respite services through parent as vendor respite or a regular respite agency instead of nursing respite.”

The addendum further states, “NBRC to initiate a Notice of Action (NOA) canceling Daycare and Respite services effective 07.31.05,” “Family to anticipate termination of cash grant, effective 07.31.05,” “Family to anticipate the termination of nursing respite, effective 07.31.05,” “Aid to Adoptive Parents (AAP) to fund current subsidy

² Given the facts set forth in Finding 5, it appears this last date was intended to have read “6-28-05.”

of \$5,009 per month, effective 04.01.05,” and “NBRC funded service to be authorized only until AAP monies are awarded to family.”

9. On June 23, 2005, the service agency issued the Notice of Proposed Action referred to in the IPP addendum.³ The notice stated that the service agency proposed to “discontinue funding for respite, and ‘cash grant in-lieu of nursing daycare’” effective July 31, 2005. The reason for the proposed action was stated as:

Guardian began receiving AAP funds as of 04.01.05 at the 4I rate. This is a generic resource; if guardian desires time off, the AAP funds should be used for that. In addition, AAP grants are for care and supervision of the child,⁴ so those funds can be used for day care if the guardian chooses to work outside the home. Continuing the cash grant and respite would not constitute a cost-effective use of public funds.

10. Upon receipt of the Notice of Proposed Action, on June 24, 2005, claimant’s father filed on his son’s behalf a Fair Hearing Request. At the same time, he requested mediation. Asked on the hearing request form to “describe what is needed to resolve your complaint,” claimant’s father wrote, “Continue Grant in lieu of Day Care Nursing through November 30, 2006. Continue family vendored respite as needed by family.”

Mediation Agreement

11. The service agency agreed to mediation. The parties met on August 5, 2005, and signed a final mediation agreement. It states, in its entirety:

The parties have reached a final agreement in this matter.
The terms of the agreement are as follows:

1. North Bay Regional Center agrees to fund “cash grant in lieu of nursing day care” at the rate of \$2,609 per month through October 15, 2005.
2. North Bay Regional Center will amend the July 11, 2005 addendum to the IPP to change the purchase language for

³ Although the addendum was prepared on July 11, 2005, it made reference to “Addendum Date[s]” of June 14, June 22, June 24, and July 11, 2005. The notice of action had already been issued by the time the addendum was finalized.

⁴ Alfonso Carmona, the service agency’s director of client services testified that he spoke with a supervisor in Solano County’s AAP program, who told him that AAP funding is designed to be used to meet the child’s needs, and that the county recognizes it needs to do a better job of informing adoptive parents of this fact.

cash grant in lieu of nursing day [care] to read: “North Bay Regional Center to fund day care nursing grant in the amount of \$2609 per month through 10/15/05.”

3. Claimant does not request funding for cash grant in lieu of nursing day care after October 15, 2005. Claimant may seek provision of such services in the future should circumstances require him to do so.
4. Claimant does not challenge the termination of nursing respite effective July 31, 2005. Family has not been utilizing this service.
5. North Bay Regional Center agrees to fund, in lieu of nursing respite, family member voucher respite at the negotiated rate of \$15 per hour for a total of 105 hours per quarter, from August 8, 2005 through April 30, 2006. North Bay Regional Center will amend the IPP to reflect this purchase of service.
6. In light of this agreement, claimant no longer wishes to have a fair hearing and hereby withdraws that request. A copy of the withdrawal form is attached.⁵

The parties acknowledge that they have entered into a binding and enforceable agreement. The parties further acknowledge that a copy of this agreement will be provided by the Office of Administrative Hearings to the Department of Developmental Services.

Subsequent Events

12. Claimant continued to receive the parent-vouchered nursing respite funds through April 2006. According to claimant’s father, in late April 2006 his wife called claimant’s client program coordinator (CPC) to inquire about getting a respite worksheet completed to document claimant’s ongoing need for nursing respite. Claimant’s wife was informed that the CPC was no longer with the service agency and that the new CPC was Eric Martin. Claimant’s father spoke with Martin about respite on June 16, 2006. Martin was unaware that a mediation agreement had been reached. In his notes of that telephone call, Martin wrote, “Robert said that as a result of mediation last year that parent vendor respite was authorized in place of nursing respite. CMS [case management supervisor] could not

⁵ The withdrawal form states only that the “matter has been satisfactorily resolved” through mediation. No further explanation was provided.

find the mediation report in Skyler's chart and said he would track it down and call Robert back." Martin had another telephone conversation with claimant's father on June 20. His note of that conversation stated, "TC with Robert and reviewed the mediation report from 8-5-05. Robert said that in good faith respite was discussed and he believed that it would be an ongoing service. CMS will review chart for information about discussion of respite during mediation."

13. On June 21, 2006, Martin scheduled an interdisciplinary team meeting "to discuss respite needs." Martin arranged to go to claimant's home on June 26 to complete a respite worksheet. His notes of that visit state, "CPC met Skyler and his parents at their home. We completed the respite worksheet and discussed the results of the mediation from August 2005. Mr. [P.] assumed that respite would be on-going." The respite worksheet completed that day showed that claimant required up to 84 hours per quarter of respite. At the hearing, the service agency conceded that, because of information overlooked at the time that worksheet was completed as well as additional information presented at the hearing, claimant actually requires up to 105 hours per quarter, the amount that had previously been authorized.

14. Martin prepared a "Program Assessment and Review of Extraordinary Proposal for Purchased Services" form on which he detailed claimant's parents' request "that respite continue at 105 hours per quarter at the negotiated rate of \$15 per hour." A Program Assessment and Review Team met on July 12, 2006, at which time claimant's "nursing respite request was denied." The reasons given for denial of continued funding of parent-vouchered nursing respite were: "Per mediation agreement, claimant agreed nursing respite would terminate 4-30-06. This would not be a cost-effective use of public funds. Nursing respite would be a duplication of services." On that same day, the service agency issued the Notice of Proposed Action that resulted in this hearing.

The Parties' Conflicting Views of the Intent of the Mediation Agreement

15. The service agency maintains the intent of the mediation agreement was that parent-vendored nursing respite would end on April 30, 2006, and that this service would thereafter be covered by AAP funds.

16. Claimant has a different view. Claimant's father maintains he never agreed to a complete termination of nursing respite. He concedes that, as set forth in term #4 of the mediation agreement, the family was not challenging the termination of nursing respite effective July 31, 2005, because they had not been utilizing the service. But they had not been using the service because Advantage Home Healthcare had no nurses available to provide respite care. So he and his wife had asked for parent-vouchered nursing respite instead. He testified, "What I had agreed to was that North Bay Regional Center would end vouchered nursing respite and give Nancy and I parent-vouchered respite, at a rate of \$15." And he maintains that, "in good faith," he believed that at the end of the time period specified in term #5 of the mediation agreement the service agency would initiate "the

normal process of having a respite sheet worked out to determine the needs of the child [at that time] and then move on from there.”

LEGAL CONCLUSIONS

Does claimant’s receipt of AAP benefits obviate the service agency’s obligation to fund needed nursing respite services?

1. The Lanterman Act mandates that a regional center’s provision of services reflect the cost-effective use of public resources. (Welf. & Inst. Code, § 4646, subd. (a).) Welfare and Institutions Code section 4648, subdivision (a) provides that regional center funds are not to be used “to supplant the budget of any agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services.” Such agencies are often referred to as “generic resources.” The service agency argues that AAP benefits are a generic resource, that if it were to continue respite payments it would be supplanting the budget of that agency, and that this would not be a cost-effective use of public funds.

2. The California AAP is a federally funded adoption subsidy program under Title IV-E of the Social Security Act. (Welf. & Inst. Code, § 16115 et seq.) It provides financial assistance in the form of a cash benefit to families that adopt special needs children. The purpose of AAP is to remove financial barriers to adoption of children who would not otherwise have the security and stability of permanent homes, while simultaneously achieving substantial savings to the state in foster care costs by reducing foster home care. The amount of the cash benefit is based upon the needs of the child and the circumstances of the family. The latter term includes “the family’s ability to incorporate the child into the household in relation to the lifestyle, standard of living, and . . . the overall capacity to meet the immediate and future plans and needs, including education, of the child.” But AAP benefits are not earmarked to pay for any specific service. (Welf. & Inst. Code, § 16119, subds. (d)(1) and (2).)

Because AAP funds are not designated for any particular purpose, adoptive parents have broad discretion to spend or retain the funds. In fact, California Code of Regulations, title 22, section 35333, subdivision (f)(2), provides that once the adoption is final, “the adoptive parents shall have the right to use the AAP benefit to meet the child’s needs as they deem appropriate without further agency approval.”⁶ Consequently, claimant’s parents cannot be considered to be receiving funds for respite from a generic resource within the meaning of the Lanterman Act. Absent specific earmarking of the AAP benefit for respite pursuant to a clear legal mandate, claimant’s parents’ receipt of those benefits does not obviate the service agency’s obligation to fund needed nursing respite services.

⁶ The hearsay statement of a supervisor in Solano County’s AAP, that the program’s funding is designed to be used to meet the child’s needs is in accordance with this regulation. But it does not alter the fact that the adoptive parents are free to use the AAP benefits for any need they choose.

Does the mediation agreement entered into by the parties nevertheless free the service agency of its obligation to fund nursing respite services?

3. As indicated above, the parties have conflicting views of the intent of term #5 of the mediation agreement. The service agency contends that provision of the agreement was intended to terminate nursing respite services as of April 30, 2006, while claimant contends it was merely to set the rate and hours for nursing respite services to be provided up until that date.

4. Term #5 states, “North Bay Regional Center agrees to fund, in lieu of nursing respite, family member voucher respite at the negotiated rate of \$15 per hour for a total of 105 hours per quarter, from August 8, 2005 through April 30, 2006. North Bay Regional Center will amend the IPP to reflect this purchase of services.” Considering the circumstances of the case and other language in the agreement, this term is ambiguous in one respect: it does not say what will happen to nursing respite after April 30, 2006.

The service agency proposed to discontinue both the cash grant in lieu of nursing day care and nursing respite effective July 31, 2005, because claimant’s parents had begun receiving AAP benefits. Claimant appealed, seeking continuance of the cash grant through November 30, 2006, and nursing respite “as needed by [the] family.” The parties thereafter agreed to mediate these two issues. Term #2 of the agreement provides that the cash grant would continue through October 15, 2005. Term #3 provides that after that date, claimant could “seek provision of such services in the future should circumstances require him to do so.” Taken together, these two terms unambiguously terminate the cash grant on a certain date, granting claimant leave to seek to have it reinstated should circumstances change. Term #5 is almost identical in structure to term #2 and provides that nursing respite would continue through April 30, 2006. But there is no term that parallels term #3. The agreement is silent as to what happens with respite after April 30, 2006. This leaves the agreement ambiguous about whether that date represents a final termination date or something other than that.

5. In light of this ambiguity, it cannot be found that the agreement either frees the service agency of its obligation to fund needed nursing respite services or bars claimant from seeking continuation of nursing respite absent a showing of changed circumstances. This result might seem to be unfair to the service agency, which entered into an agreement it believed would act as a final resolution of the nursing respite issue. But it is the ambiguous language of term #5, and nothing else, which precludes that provision from being interpreted in the way the service agency seeks.

ORDER

Claimant's appeal is granted. The service agency shall continue funding parent-vouchered nursing respite for up to 105 hours per quarter.

DATED: _____

MICHAEL C. COHN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.